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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 689

TAYLOR INSTRUMENT COMPANIES,
Petitioner,

vs.

FAWLEY-BROST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is an application on behalf of TAYLOR INSTRUMENT COMPANIES, a New York corporation, of Rochester, New York, for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Seventh Circuit entered on November 15, 1943 reversing the District Court for the Northern District of Illinois, Eastern Division.

The opinion of the Circuit Court of Appeals is at page 428 of the record, and is reported in 139 Fed. (2d) 98. The opinion of the District Court is published in 56 U. S. P. Q. 213 and the judgment of the District Court is at page 409 of the record.

I.

Jurisdiction.

(a) Federal jurisdiction of the Courts below existed under the Copyright Act of 1909 (U. S. C. A. Title 17, Secs. 1-63) and the Trade Mark Acts of 1905 and 1920 (U. S. C. A. Title 15, Secs. 81-134).

(b) The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 938; U. S. C. A., Title 28, Sec. 347(a).

(c) This Court has never passed upon the question of copyright law presented in this case.

II.

The Questions Presented.

The questions are:

(1) The construction of Sec. 5(i) of the Copyright Act of 1909 (U. S. C. A. Title 17, Secs. 1-63). Whether, as the Circuit Court of Appeals held, copyrightable and duly copyrighted subject matter ceases to be such when it is used in a machine, and whether, when so used, it can be appropriated without license or liability;

(2) There is also involved the construction of the Trade Mark Acts of 1905 and 1920 (U. S. C. A. Title 15, Secs. 81-134). The question is whether the owner of a validly registered trade mark under these acts is protected against the use of it or of abbreviations of it applied without license by a competitor to identical goods.

Both these rights, secured by federal statutes, the District Court upheld and the Circuit Court of Appeals denied.

III.

Summary and Short Statement of the Matters Involved.

Petitioner makes charts for recording instruments such as recording thermometers used in dairies and in many industries where temperature, pressure and flow records are required. The compilation of such charts requires a high degree of care, skill and intellectual effort (Rec. 110-115). These charts are copyrighted by the petitioner, and are sold under the trade mark "Taylor."* This action was brought to enjoin respondent from using petitioner's registered trade mark and from copying petitioner's copyrighted charts for use in connection with recording thermometers. Petitioner's charts, which were the subject matter of the action, embody intellectual effort and were validly copyrighted by the petitioner as "Drawings of a Scientific or Technical Character" under Sec. 5(i) of the Copyright Act of 1909. The Register of Copyrights issued to the petitioner, copyright certificates for each chart sued upon.

The District Court found that petitioner's charts are proper copyright subject matter, that respondent's charts are copies of petitioner's charts and were copied therefrom without petitioner's permission; that this copying saved the respondent the labor and expense of computing and designing charts, and constituted infringement under the Copyright Act (Rec. 405-408).

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* One of petitioner's copyrighted charts, No. O. P. 1599 (Exhibit B to the complaint) upon which the trade mark "Taylor" is displayed, and one of respondent's charts, No. T-OP 1599 (Exhibit C-2 to the complaint), which is a copy of petitioner's chart Exhibit B, both slightly reduced in size, are reproduced as an Appendix to this petition. It will be observed that respondent claims copyright for its chart.

The Circuit Court of Appeals did not disturb the District Court's findings, but reversed on the ground that the purpose of petitioner's charts is use, not explanation; that they are mechanical devices, protection of which belongs exclusively in the patent field.

Petitioner indicates the origin of its charts by applying its registered trade mark "Taylor" to them. The name "Taylor" has acquired a secondary meaning and indicates petitioner and petitioner's products only (Rec. 406). Respondent designates charts made by it, as "Taylor" or abbreviated "Tay" and "T". Petitioner contended that these acts infringe plaintiff's registered and common law trade mark "Taylor". The District Court so held.

Respondent passed off charts of its manufacture without explanation, upon orders for "Taylor" charts (Rec. 407). Petitioner contended that this was actionable passing off and unfair competition. The District Court so held.

Without disturbing the District Court's findings that the name "Taylor" had acquired a secondary meaning indicating petitioner and petitioner's products only, and its registration valid, that "Tay" and "T" are abbreviations of petitioner's trade mark and that respondent sold charts not coming from petitioner as "Taylor" charts, the Circuit Court of Appeals held that respondent had a right to describe its charts as "Taylor" and to mark them with the abbreviations "Tay" or "T". The reason assigned by the Court is that respondent's charts are replacement parts for petitioner's recording instruments.

IV.

Reasons Relied Upon for the Allowance of the Writ.

1. It is a matter of public importance that the owner of an original copyright work should be protected against piracy. The Circuit Court of Appeals has denied petitioner the protection which the Copyright Act gives.

2. Since the Copyright Act of 1909 the industry has copyrighted charts for recording instruments and have respected their competitors' copyrights. The Copyright Office has long accepted such charts for copyright and has accepted thousands of dollars as fees. The decision of the Circuit Court of Appeals holding them uncopyrightable has overturned a trade practice of long standing and the administrative interpretation of the law.

3. It is a matter of public importance that this Court determine the validity and scope of copyrights under Sec. 5(i) of the Copyright Act (Drawings of a Scientific or Technical Character). This question has never been passed upon by this Court.

4. It is a matter of public importance that registered trade marks should be protected against misuse.

5. It is a matter of public importance that statutes designed to protect copyrights and trade marks should be applied by the Courts so as to carry out the purpose of Congress in enacting them, in order that the rights conferred on the owners of copyrights and registrants of trade marks may be secured, and the remedies against infringement applied.

6. The decision of the Circuit Court of Appeals is in conflict with the proper application of Rule 52(a) of the Rules of Civil Procedure, which provides that:

> 'Findings of fact shall not be set aside unless clearly erroneous * * *.''

Petitioner asks this Court to grant a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review its decision in this case.

Respectfully submitted,

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